Supreme Court, U.S.
FILED
JUL 2 1999
OFFICE OF THE CLERK

No. 98-1932

In The

Supreme Court of the United States

GEORGE PATAKI, as Governor of the State of New York, THE NEW YORK STATE EDUCATION DEPARTMENT, RICHARD P. MILLS, as Commissioner of the New York State Education Department, THE NEW YORK STATE BOARD OF REGENTS, H. CARL MCCALL, as the New York State Comptroller, THE BOARD OF EDUCATION OF THE KIRYAS JOEL UNION FREE SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT and DR. WILLIAM J. BASSETT, JR., as District Superintendent of the Orange-Ulster BOCES,

Petitioners,

v.

LOUIS GRUMET AND CAROLINE C. SHIPLEY,

Respondents.

On Petition For A Writ Of Certiorari To The New York State Court Of Appeals

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the New York Court of Appeals subverted this Court's decisions in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994) and *Agostini v. Felton*, 521 U.S. 203 (1997) when it invalidated a state statute which allowed a religious community to obtain its own public school district but which did not provide that benefit to the religious community as one of many eligible communities for equal treatment.

LIST OF PARTIES

The parties to the proceeding below were:

Louis Grumet,
Caroline C. Shipley,

Plaintiffs-Respondents,

George Pataki, as Governor of the State of New York,
The New York State Education Department,
Richard P. Mills, as Commissioner of the New York State Education Department,
The New York State Board of Regents,
H. Carl McCall, as New York State Comptroller,
The Board of Education of the Kiryas Joel Union Free School District,
The Board of Education of the Monroe-Woodbury Central School District,
Dr. William J. Bassett, Jr., as District Superintendent of the Orange-Ulster BOCES,

Defendants-Appellants.

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JURISDICTION

This Court's jurisdiction is discretionary under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . "

Section 1504 of the New York State Education Law as amended by Chapter 390 of the Laws of 1997, provides, in relevant part that:

> 3. Any municipality situated wholly within one central or union free school district but whose boundaries are not coterminous with the boundaries of such school district may organize, pursuant to the provisions of this subdivision, a new union free school district consisting of the entire territory of such municipality whenever required by the educational interests of the community.
>
> a. No such new school district may be organized unless: (i) the enrollment of the municipality seeking to organize such new school district equals at least two thousand children, and is no greater than sixty percent of the enrollment of the existing school district from which such new school district will be organized; (ii) such new school district would have an actual valuation per total wealth pupil unit at least equal to the statewide average; and (iii) the

> enrollment of the existing school district from which such new school district will be organized equals at least two thousand children, excluding the residents of such municipality.
>
> g. For the purposes of this subdivision, the term "municipality" shall mean a city, town, or village . . .

Section 1504 of the New York State Education Law, as amended by Chapter 241 of the Laws of 1994, (the precursor to Chapter 390 of the Laws of 1997), provided in relevant part that:

> 3. Any municipality situated wholly within a single central or union free school district, but whose boundaries are not coterminous with the boundaries of such school district, may organize a new union free school district, pursuant to the provisions of this subdivision, consisting of the entire territory of such municipality, whenever the educational interests of the community require it.
>
> a. No such new school district shall be organized unless: (i) the enrollment of the municipality seeking to organize such new school district equals at least two thousand children, and is no greater than sixty percent of the enrollment of the existing school district from which such new school district will be organized; (ii) such new school district would have actual valuation per total wealth pupil unit at least equal to the statewide average; (iii) the enrollment of the existing school district from which such new school district will be organized equals at least two thousand children, excluding the residents of such municipality; and (iv) the actual valuation per total wealth

pupil unit of such existing school district will not increase or decrease by more than ten percent following the organization of the new school district by such municipality.

g. For the purposes of this subdivision, the term "municipality" shall mean a city, town or village in existence as of the effective date of this subdivision . . .

COUNTERSTATEMENT OF THE CASE

This case involves the Satmar Hasidic religious community of the Village of Kiryas Joel ("the Village"), located in Orange County, New York, and the constitutional validity of New York State's most recent effort to afford that community its own separate public school district. At issue is not the question of whether government may accommodate the religious needs and/or preferences of its citizens. Nor is it at issue the manner in which the Petitioner Board of Education of the Kiryas Joel Union Free School District operates a public school district. Instead, the case concerns strictly whether New York State's latest effort to accommodate the religious preferences of the Village residents for a separate public school district conforms with this Court's previous decisions in *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994),[1] and *Agostini v. Felton*, 521 U.S. 203 (1997).

[1] In the past, the residents of the Village of Kiryas Joel have maintained that they "prefer to live together 'to facilitate individual religious observance and maintain social, cultural and religious values' " and that their religious precepts do not

General Background

The early history of this case is well documented in this Court's decision in *Board of Educ. of the Kiryas Joel Village School Dist. v. Grumet, supra.* Briefly, the Village is a municipality inhabited by members of a single religious group whose children are educated in private religious schools where they receive instruction in their religious way of life, and their exposure to secular subjects is limited. (*Id.*, at 690-91). However, the Village's private religious schools do not offer special education services for children with disabilities. (*Id.*, at 692).

Prior to this Court's decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), the Village children with disabilities received special education services from Petitioner Board of Education of the Monroe-Woodbury Central School District ("Monroe-Woodbury"), which provided those services at an annex to one of the Village's religious schools. (512 U.S. at 692). However, following the *Aguilar* decision Monroe-Woodbury ended the arrangement, and the Village residents found it unsatisfactory having to send their children to Monroe-Woodbury's public schools. (*Id.*; *Board of Educ. of the Monroe-Woodbury Central School Dist. v. Wieder*, 72 N.Y. 2d 174 (1988)). The present

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preclude them from interacting with others. (*Board of Educ. of the Kiryas Joel Village School Dist. v. Grumet, supra*, at 706, n.9). It is the "trauma" suffered by their children in the presence of others who are different from them, instead of "religious practice or doctrine" which allegedly drives their desire for a separate school district. (*Id.*, at 692-693; *Board of Educ. of the Monroe-Woodbury Central School Dist. v. Wieder*, 72 N.Y. 2d 174, 180-181 (1988)).

case involves New York State's third attempt to provide the Village with its own public school district.

The First Attempt to Provide the Village with a Separate School District

New York State's first attempt to provide the Village its own public school district was the subject of this Court's review in *Kiryas Joel*. A majority of this Court invalidated Chapter 748 of the Laws of 1989[2] because there was " . . . no assurance that the next similarly situated group seeking a school district of its own will receive one . . . " (512 U.S. at 703). However, that determination was based specifically on the fact that "the religious community of Kiryas Joel did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law". (*Id.*). The concern of the *Kiryas Joel* majority was further echoed in the concurring opinions of Justice O'Connor and Justice Kennedy, both of whom indicated that it would be appropriate for New York State to afford the Village its own public school district under "generally applicable legislation" which is "religion-neutral". (512 U.S. at 716-17 (O'Connor, J., concurring); 512 U.S. at 728-30 (Kennedy, J., concurring)).

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[2] Chapter 748 of the Laws of 1989 provided, in relevant part, that "[t]he territory of the village of Kiryas Joel . . . shall be and hereby is constituted as a separate school district, and shall be known as the Kiryas Joel village school district and shall have all the powers and duties of a union free school district under the provisions of the education law."

The Second Attempt to Provide the Village with a Separate School District

In response to this Court's *Kiryas Joel* decision, the New York State Legislature and its Governor enacted into law Chapter 241 of the Laws of 1994 ("Chapter 241"). Although the trial court found Chapter 241 to be constitutionally valid, (*Grumet v. Cuomo*, 164 Misc.2d 644 (1995)), two state appellate courts, including the New York Court of Appeals disagreed. (*Grumet v. Cuomo*, 225 A.D.2d 4 (3d Dep't 1996); 90 N.Y. 2d 57 (1997)).

In its *Grumet v. Cuomo* decision, the New York Court of Appeals expressly acknowledged that it was permissible for the New York State Legislature to attempt to cure the constitutional infirmity identified by this Court in *Kiryas Joel* and explained that:

> the Legislature might have achieved a constitutionally acceptable result had it enacted a truly religion neutral law of general applicability that the Village of Kiryas Joel, as one in a broad array of eligible municipalities, might have invoked. Instead, . . . the Legislature's attempt to remedy chapter 748 through the enactment of chapter 241 produced a law whose actual effect confers a benefit on the religious community of Kiryas Joel alone and for all practical purposes effectively replicates the prior unconstitutional law. (90 N.Y. 2d at 75).

The *Grumet v. Cuomo* decisions and the Record therein indicate that there are over 1,500 municipalities in New York State. However, the Village was the only one able to meet the qualifications required by Chapter 241.

(90 N.Y. 2d at 73; 225 A.D.2d at 9). Indeed, contemporaneous media reports quoted the spokesperson for the statute's legislative sponsor as stating that " '[t]he trick for negotiators [was] to craft legislation so Kiryas Joel would be virtually the only village to take advantage of the opportunity to create a district – even though others technically could.' " (225 A.D.2d at 9).

The New York Court of Appeals found most problematic the limitation restricting the statute's applicability to municipalities in existence at the time of its enactment because it "cut off any group, religious or nonreligious . . . that lacked the foresight to incorporate as a village before the enactment of the statute . . . " (90 N.Y. 2d at 72-73). Similarly, it also questioned the criteria which required that a school district created under Chapter 241 not cause the per pupil wealth of the preexisting district to increase by more than 10% because "there assuredly would be no sound reason to protect a district from a wealth increase." (*Id.*, at 72). Nonetheless, the New York Court of Appeals characterized Chapter 241's qualifying criteria as "perhaps well-intentioned and not entirely devoid of secular justification." (90 N.Y. 2d at 73). The constitutional problem arose because the criteria were "drawn in such a way that 'the benefit flow[ed] only to a single sect.' " (90 N.Y. 2d at 73, citing *Kiryas Joel*, 512 U.S. at 705).

According to the New York Court of Appeals, Chapter 241:

> [i]n its actual effect, . . . operate[d] not as a generally applicable, religion-neutral law, but ha[d] the same nonneutral effect of singling out Kiryas Joel for special treatment that caused this

> Court and the Supreme Court to strike down chapter 748 of the Laws of 1989 in *Kiryas Joel I*: '[T]he religious community of Kiryas Joel did not receive its governmental authority simply as one of many communities eligible for equal treatment under a [truly] general law.' (*Id.*, citing *Kiryas Joel*, 512 U.S. at 703).

Consequently, the statute was found to violate "the Establishment Clause neutrality principles that form the core holding of *Kiryas Joel I* and, for essentially the same reasons . . . conveys an endorsement of the Satmar religion." (90 N.Y. 2d at 69). As set forth at page 11 of the Petition for Writ of Certiorari, no review was sought from this Court regarding the New York Court of Appeals decision in *Grumet v. Cuomo*.

The Third and Most Recent Attempt to Provide the Village with a Separate School District

Subsequent to the New York Court of Appeals' decision in *Grumet v. Cuomo, supra*, and as set forth in the papers recently submitted to this Court by the Respondents in Opposition to the Petitioners' Request for a Stay, Petitioner Richard P. Mills, as Commissioner of the New York State Department of Education, issued several orders pursuant to which the Village children who had attended the Kiryas Joel School District were to once again receive special education services from Monroe-Woodbury. However, during the transitional period for the transfer of responsibilities to Monroe-Woodbury, New York State adopted Chapter 390 of the Laws of 1997 ("Chapter 390"), which allowed the Village to reconstitute a school district of its own.

It is Chapter 390 which is at issue in the Petition for Writ of Certiorari herein. The statute's qualifying criteria are identical to those of its predecessor, Chapter 241, with two exceptions. First, Chapter 390 eliminated the previous limitation restricting the statute's applicability to municipalities in existence at the time of its enactment. Second, it also eliminated the criteria which had required that the actual valuation per total wealth pupil unit of the existing school district not increase or decrease by more than 10%. However, the elimination of this criteria allowed only one other existing municipality, in addition to the Village, to qualify for benefits of Chapter 390.

The Petitioners represent at pages 11-12 of the Petition that Chapter 390 "was not designed solely to apply to Kiryas Joel . . . " In support of their contention they refer this Court to Governor George Pataki's approval memorandum which they state "declared . . . that 10 of the state's municipalities (including Kiryas Joel) would be immediately eligible to form school districts under the legislation" as well as, in a footnote at page 13 of the Petition, to affidavits submitted by the Board of Education of the Kiryas Joel School District "attesting that ten municipalities would immediately be able to form school districts under the law if they incorporated." However, as the New York Court of Appeals observed in the decision below, the Petitioners failed to show any additional eligible municipalities. (Pet. App. A, at 11a n.7). Moreover, as the Record below indicates, the affidavits submitted by experts on behalf of the Kiryas Joel School District and the State Petitioners confirm that Chapter 390 applies to only two municipalities in the entire State of New York.

As the Record below indicates, affidavits submitted by counsel for the Board of Education of the Kiryas Joel School District and counsel for Monroe-Woodbury attesting that certain cities and unincorporated communities are eligible or potentially eligible under Chapter 390's qualifying criteria lacked probative value for two reasons. First, they ignored the clear language of the statute that Chapter 390 does not apply to cities because even though the statute defines "municipality" to include "a city, town or village", it also requires that a qualifying municipality be wholly contained in a central or union free school district. However, under the New York State Education Law, school districts in cities with a population of less than 125,000 inhabitants are small city school districts, (N.Y. Educ. L. § 2501), and school districts in cities with a population of more than 125,000 inhabitants, which include the cities of New York, Buffalo, Rochester, Syracuse and Yonkers, are large city school districts, (N.Y. Educ. L. §§ 2550, 2551), instead of central or union free. Indeed, the State Petitioners conceded as much in their opposition to Respondents' motion for a preliminary injunction to stay the implementation of Chapter 390, and the expert for the Kiryas Joel School District attested that he considered cities in his analysis of the statute because he was "directed to consider cities" by the law firm which retained his services.

Second, the expert for the Kiryas Joel School District also attested that there were certain areas identified by the United States Census Bureau as Census Designated Places ("CDPs") which are not presently incorporated but would qualify under the statute if they were. However, he also conceded that "there is no specific data available regarding the school valuation or municipal enrollment

of CDPs" and that he admittedly manufactured his own data on CDPs to determine eligibility under the statute's criteria requiring that the new school district have an actual valuation per total wealth pupil unit which is at least equal to the statewide average.

It was upon consideration of "both the form and the effect" of the statute that the New York Court of Appeals, in the decision below, determined that:

> [a]lthough Chapter 390 sets forth facially neutral criteria, any attempt to characterize the statute as a religion-neutral law of general applicability is belied by its actual effect . . . In practical effect . . . the religious community of Kiryas Joel is not 'merely one in a series of many communities' eligible for equal treatment under Chapter 390's special school district laws." (Pet. App. A, at 11a (citations omitted)).

In so ruling, the New York Court of Appeals acknowledged that Chapter 390 eliminated the two qualifying criteria of Chapter 241 it had questioned in *Grumet v. Cuomo*, 90 N.Y. 2d at 72-73. However, notwithstanding the representations by Petitioners at page 11 of the Petition for Writ of Certiorari, the New York Court of Appeals also made clear that in its *Grumet v. Cuomo* decision it had not suggested that "the mere deletion of those [two] defective provisions would render the statute constitutional." (Pet. App. A, at 13a n.9). Instead, it had observed that to obtain a constitutionally permissible result, the Legislature needs to enact "a truly religion-neutral law of general applicability that the Village of Kiryas Joel, as one in a broad array of general municipalities, might . . . invoke[ ]." (*Id.*).

Thus, the New York Court of Appeals determined that although Chapter 390 eliminated the two qualifying criteria questioned in *Grumet v. Cuomo*, the statute's "eligibility requirements . . . are still limited in such a way that permits the statute's benefits to flow almost exclusively to . . . [Kiryas Joel]." (Pet. App. A, at 12a-13a). According to the New York Court of Appeals, "it does not follow that Chapter 390 – by allowing one additional municipality to qualify under the statute – is a general, religion-neutral law." (Pet. App. A, at 12a).

Moreover, the New York Court of Appeals expressly stated that contrary to the view expressed by the dissent below, (referenced by Petitioners at page 13 of the Petition for Writ of Certiorari), its decision did not stand for the proposition that "statutes that do not apply to a sufficiently broad spectrum of religious groups will automatically be considered unconstitutional . . . " (Pet. App. A, at 19a n.11). It explained, however, that this Court's Establishment Clause jurisprudence, including the *Agostini* decision, 521 U.S. 203, *supra*, allows for consideration of "whether a challenged State action benefits a broad spectrum of groups" when assessing the secular effect of government action. (Pet. App. A, at 11a n.8).

REASONS FOR DENYING THE WRIT

I.

The Decision Of The New York Court Of Appeals Does Not Subvert This Court's Rulings in *Kiryas Joel* And *Agostini v. Felton.*

A. Religious Accommodation.

Contrary to the representations by Petitioners at pages 14-16 of the Petition for Writ of Certiorari, the New York Court of Appeals did not subvert the Establishment Clause accommodation principles which underscored the decision of a majority of this Court in *Board of Educ. of the Kiryas Joel Village School Dist. v. Grumet, supra.*

In *Kiryas Joel*, a majority of this Court explained that " 'government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause.' " (512 U.S. at 705-706 (citations omitted)). However, "accommodation is not a principle without limits . . . " (*Id.*, at 706). Thus, the *Kiryas Joel* majority invalidated Chapter 748 of the Laws of 1989 not because it "facilitate[d] the practice of religion" but because the "proposed accommodation single[d] out a particular religious sect for special treatment . . . and whatever the limits of permissible legislative accommodations may be . . . it is clear that neutrality as among religions must be honored." (*Id.*, at 706-707).

According to the *Kiryas Joel* majority, the method chosen by the New York Legislature to accommodate the Satmar community was "one that aid[ed] a particular religious community, . . . rather than all groups similarly interested in separate schooling." (512 U.S. at 708). The validity of the statute would have been upheld if it had

allowed the Village to obtain a public school district "simply as one of many communities eligible for equal treatment under a general law," (*Id.*, at 703; *see also*, 512 U.S. 687, 716-17 (O'Connor, J. concurring); 512 U.S. 687, 728-30 (Kennedy, J., concurring)), thus providing "assurance that the next similarly situated group seeking a school district of its own will receive one . . . " (512 U.S. at 703).

Similarly, the New York Court of Appeals ruled that Chapter 390 constitutes an unconstitutional accommodation of religion. (Pet. App. A, at 13a-20a). However, the Petitioners take exception to this ruling at page 16 of the Petition for Writ of Certiorari stating that:

> The majority in the Court of Appeals ignored [the *Kiryas Joel*] principles of accommodation when it invalidated Chapter 390 as having the primary effect of advancing or preferring one religion over others. The majority concluded that because only two municipalities (one of which is not a religious community) currently qualify under the generally applicable scheme of Chapter 390 to form school districts, and because the statute was an extension of past attempts to accommodate the Satmar community in particular, 'the secular effect of the statute is virtually indiscernible' . . . This view that a neutral statute must fail because it reflects a legislative intent to assist the Satmar community turns this Court's Establishment Clause jurisprudence upside down.

Contrary to the Petitioners' representations, the New York Court of Appeals decision made clear that it was not

the fact "[t]hat Chapter 390 was designed to accommodate the needs of the religious community of Kiryas Joel . . . [which] renders it unconstitutional," (Pet. App. A, at 18a), and that "a statute accommodating a religious group does not automatically create the impermissible effect of advancing religion." (*Id.* (citations omitted)). However, the New York Court of Appeals determined that Chapter 390 violates Establishment Clause neutrality principles. It also has the primary effect of advancing religion "for many of the same reasons [it] violates . . . neutrality principles." (Pet. App. A, at 12a-13a, 18a).

According to the New York Court of Appeals, Chapter 390 violates Establishment Clause neutrality principles because:

> a statute so narrowly drawn that it delegates a significant governmental power almost exclusively to a single religious group, . . . provides no assurance that the statute's benefits will be equally available to others . . . (*Id.; see also,* Pet. App. A, at 12a-13a).

As such, it is not a "truly religion neutral and generally applicable law" which allows the Village to obtain a public school district " 'merely as one in a series of many communities' eligible for equal treatment". (Pet. App. A, at 11a (citations omitted)).

In addition, this Court observed in its 1997 *Agostini v. Felton* decision that "the general principles . . . used to evaluate whether government violates the Establishment Clause" still require inquiry into the purpose and effect of governmental action, including "whether . . . [governmental action] has the 'effect' of advancing or

inhibiting religion." (521 U.S. 203, at 222-23). As indicated by the New York Court of Appeals:

> The class benefitted under Chapter 390 is anything but broad. Recognition of the fact that the statute benefits an extremely narrow class of municipalities is not a mere exercise in arithmetic or counting . . . The Supreme Court has held that the provision of benefits to a " 'broad * * * spectrum of groups is an important index of secular effect.' " (Pet. App. A, at 19a, citing *Kiryas Joel*, 512 U.S. at 703, *supra*; *Board of Educ. of the Westside Comm. Schools v. Mergens*, 496 U.S. 226, 252 (1990); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 673 (1970); *Bowen v. Kendrick*, 487 U.S. 589, 608 (1988)).

Thus, contrary to the Petitioners' representations, the New York Court of Appeals did not subvert this Court's religious accommodation principles when it considered the scope of the statute's applicability in determining that Chapter 390 constitutes an impermissible accommodation of religion.

B. Neutrality and General Applicability of Statutory Criteria.

According to the Petitioners at pages 17-18 of the Petition for Writ of Certiorari, the New York Court of Appeals ruling subverts the decision of this Court's *Kiryas Joel* majority for essentially two reasons. First, because Chapter 390 sets forth "facially neutral, educationally related criteria" which were "ratified" by the New York Court of Appeals in its 1997 *Grumet v. Cuomo* decision. Second, because applicability of the statute's

criteria does not limit its application to a religious community and any group which is unable to satisfy the statute's "neutral, legitimate and nonexclusionary criteria" is not " 'similarly situated' " to the Village. Therefore, the statute does not single out the Village for "a forbidden religious preference."

However, as the *Kiryas Joel* majority decision exemplifies, the facial neutrality of a statute is not dispositive of its constitutional validity. (*See also, Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 534 (1993); *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 772 (1995) (O'Connor, J., concurring)). Indeed,

> the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions. Governmental intent cannot control, and not all state policies are permissible under the Religion Clauses simply because they are neutral in form. (515 U.S. 753, 777 (O'Connor, J., concurring)).

Moreover, notwithstanding the Petitioners' representations, the New York Court of Appeals below expressly disclaimed that its *Grumet v. Cuomo* decision suggested "the outline of Chapter 390," or that the removal of the two criteria it had questioned in that decision "would render the statute constitutional." (Pet. App. A, at 13a n.9). Instead, what the New York Court of Appeals suggested in *Grumet v. Cuomo* was that for the Legislature to obtain "a constitutionally acceptable result" it must enact "a truly religion-neutral law of general applicability" which the Village might invoke "as one in a broad array of eligible municipalities." (*Id.*). Indeed, it was precisely

because the statute failed to do the latter that the New York Court of Appeals invalidated Chapter 241 in *Grumet v. Cuomo*. (90 N.Y. 2d at 73).

Significantly, this "broad array" requirement is in total conformity with the *Kiryas Joel* majority decision, which was based on the fact that under the statute at issue therein the Village had not obtained its school district "simply as one of many communities eligible for equal treatment under a general law." (512 U.S. at 703). However, Chapter 390 fails to meet this standard. Instead, as set forth above, only two out of more than 1,500 municipalities in the State of New York qualify for the benefits of Chapter 390.

In addition, it is disingenuous for the Petitioners to represent that any municipality which does not meet the statute's criteria is just not "similarly situated" to the Village. In the first instance, as set forth above, it was not the intention to have other municipalities qualify under the statute. The qualifying criteria of Chapter 390 is identical to that of its predecessor, Chapter 241, except for the elimination of a previous limitation restricting the statute's applicability to preexisting municipalities, and a criteria relating to increases and decreases in a preexisting school district's actual valuation per total wealth pupil unit. Chapter 241's criteria, including those surviving under Chapter 390, were drafted so that the Village would be the only municipality able to take advantage of the statute "even though others technically could." (*Grumet v. Cuomo*, 225 A.D.2d at 9). The elimination of the valuation criteria allowed only one other municipality to become eligible for the benefits of Chapter 390.

Significantly, as the Record below establishes, the additional municipality meeting the qualifying criteria of Chapter 390 became eligible under the statute only because of the elimination of the criteria referred to in the previous paragraph. Accordingly, the eligibility requirements of Chapter 390 are as limited as those of Chapter 241 and allow the statute's benefits "to flow almost exclusively" to the Village. (Pet. App. A, at 12a-13a). Therefore, it is unlikely that others will meet the Petitioners' definition of "similarly situated."

Second, the phrase "similarly situated" as used by the *Kiryas Joel* majority referred expressly to communities seeking a school district of their own, e.g.,

> Because the religious community of Kiryas Joel did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law, we have no assurance that the next similarly situated group seeking a school district of its own will receive one . . . " (512 U.S. at 703).
>
> Nor can the historical context . . . furnish us with any reason to suppose that the Satmars are merely one in a series of communities receiving the benefit of special school district laws. (*Id.*, at 703-704).
>
> . . . we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges. (*Id.*, at 704 citations omitted).
>
> . . . whatever the limits of permissible legislative accommodations may be, . . . it is clear that neutrality as among religions must be honored. (512 U.S. at 706).

> . . . we simply refuse to ignore that the method it chose is one that aids a particular religious community . . . rather than all groups similarly interested in separate schooling. (*Id.*, at 708).

C. ***Agostini v. Felton.***

The Petitioners' representations at pages 18-20 of the Petition for Writ of Certiorari that the New York Court of Appeals invalidation of Chapter 390 "rests on premises irreconcilable with this Court's more recent decision in *Agostini v. Felton*, 521 U.S. 203 (1997)" constitute a mischaracterization of the New York Court of Appeals decision below.

According to the Petitioners, the New York Court of Appeals ruled that Chapter 390 has the primary effect of advancing religion "simply because a community of religious believers benefits from the statute." However, as set forth above, the New York Court of Appeals did not determine that Chapter 390 has the primary effect of advancing religion "merely because believers are advantaged by it." Instead, it held that the statute has the primary effect of advancing religion "for many of the same reasons it violates Establishment Clause neutrality principles," (Pet. App. A, at 18a), and that the reason why it violates neutrality principles is because its qualifying criteria are so narrowly drawn as to provide no assurance of the equal availability of its benefits to others. (Pet. App. A, at 12a-13a). Fundamentally, the New York Court of Appeals deemed the statute to suffer from the same infirmity as the *Kiryas Joel* statute which did not confer its benefits on the Village " 'merely as one in a series of

many communities' eligible for equal treatment." (Pet. App. A, at 11a (citations omitted)).

In the Petitioners' view the New York Court of Appeals ruling is inconsistent with this Court's reluctance in *Agostini* "to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid." However, as the New York Court of Appeals noted below, the case herein is not the same type of Establishment Clause case as *Agostini*, which involved the provision of public aid to sectarian schools. (Pet. App. A, at 15a). Instead, as was also true in *Kiryas Joel*, the case involves the method by which a legislature may permissibly delegate governmental powers to a religious community. In accordance with the decision of the *Kiryas Joel* majority, this delegation can only be accomplished under a statute which affords its benefits to the religious community "as one of many . . . eligible for equal treatment." (512 U.S. at 703). Regarding the present case, two is not many by any standard.

The Petitioners further represent that the New York Court of Appeals decision is also inconsistent with this Court's statements in *Agostini* that "providing educational assistance to sectarian students is a legitimate purpose, as long as 'the aid is allocated on the basis of neutral secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.' " However, even if this were deemed to fall within the same category of Establishment Clause cases as *Agostini*, the Record below supports the New York Court of Appeals determination that the qualifying criteria of

Chapter 390 are not truly religion-neutral and generally applicable. As such, they are unlike those in *Agostini* which have broad application, and the New York Court of Appeals decision is not in conflict with the *Agostini* decision.

Finally, the Petitioners represent at page 19 of the Petition for Writ of Certiorari that the New York Court of Appeals decision "impos[es] a least restrictive alternative test in assessing the means the legislature chooses to accommodate burden on the exercise of religion" and

> restricts what would otherwise be permissible accommodation . . . [because it] held that since this Court decided *Agostini*, there were now other ways, short of the statute at issue, to solve the problems of educating the handicapped children of the Village of Kiryas Joel. In the majority's view Chapter 390 was not necessary and, therefore, 'would likely be perceived as a religious preference in light of the arguably constitutionally permissible alternative *Agostini* has provided.'

Put in actual context, however, and as more fully discussed above, the New York Court of Appeals determined that Chapter 390 violated Establishment Clause neutrality principles. For similar reasons it also had the effect of advancing religion. As such, it constitutes an impermissible accommodation of religion. (Pet. App. A, at 12a-13a, 18a-20a). The New York Court of Appeals then merely proceeded to add that the statute would also "likely be perceived as a religious preference" because of "its origin and operation", the Legislative Debates regarding the statute, and this Court's removal in *Agostini* of the barrier which had prevented Monroe-Woodbury

from providing services to the children of the Village in an exclusive Satmar setting. (Pet. App. A, at 20a-21a). Moreover, it was the opponents of Chapter 390 in the New York State Assembly who during Legislative Debates indicated that the statute "is legislation * * * that is not necessary. If given time and given the inclination to make the process work, students who are designed to be aided could be aided without this legislation." (Pet. App. A, at 21a).

II.

The Petitioners Have Not Properly Demonstrated That This Case Presents An Important Issue For This Court To Review

The issue in this case does not involve any broad questions of constitutional law such as whether a state may accommodate religion, or the conditions under which a religious community may acquire governmental powers. Indeed, a majority of this Court has already answered those questions, and the New York Court of Appeals acknowledged as much in its decision below.

Moreover, the only question which the New York Court of Appeals had to resolve was whether the particular method chosen by the New York State Legislature in this case to achieve such an end complies with the neutrality and general applicability requirements identified by this Court's majority in *Kiryas Joel*. Such a determination was made easier because the main parties in this case

are those also involved in the *Kiryas Joel* decision. Therefore, the issue concerned whether the New York Legislature appropriately heeded the admonition of the *Kiryas Joel* majority that a statute may confer governmental authority upon a religious community only if the community acquires such authority "as one of many . . . eligible for equal treatment." (512 U.S. at 703).

As set forth above, the statutory scheme chosen by the New York State Legislature in this case sets forth qualifying criteria which applies to only two out of over 1,500 municipalities in the State of New York. By any standard, two is not many.

The Record supporting the New York Court of Appeals decision establishes that the statute's criteria were drafted so that only the Village could take advantage of it. Indeed, the criteria were so tightly drawn that despite the revisions to its predecessor, Chapter 241, only one other municipality in addition to the Village qualifies under the statute. In this context, the *Kiryas Joel* majority indicated that in assessing the constitutional validity of a statute under the Establishment Clause it is appropriate to "insist 'up front' that a statute not tailor its benefits to apply only to one religious group." (*Id.*, at 708).

Thus, the case presents no important constitutional question for this Court to resolve.

Contrary to the Petitioners' representations at pages 21-22 of the Petition for Writ of Certiorari, the New York Court of Appeals decision is not in conflict with and does not require the reversal of either *Children's Healthcare Is a Legal Duty, Inc. v. DeParle*, Civ. No. 97-1979 (ADM/JGL) (D.Minn. July 24, 1998) or *Stark v. Independent School Dist.*

No. 640, 123 F.3d 1068 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 1560 (1998). The court in *Children's Healthcare* was not confronted with a statute that bestowed governmental authority upon a religious community. Neither was it confronted with a prior ruling from a majority of this Court that governmental authority may be bestowed upon a religious community if the religious community obtains such benefit as one of many others eligible. With respect to *Stark*, the case did not involve a delegation of political power to a religious community. Neither was the *Stark* court confronted with a situation where the accommodation at issue singled out a particular sect. (123 F.3d 1068, 1075 (1996)). Rather, it was offered pursuant to a state law which:

> allows parents to review the content of instructional materials provided to a minor child. If the parent objects to that content, the district must make reasonable arrangements for alternative instruction. (*Id.*, at 1071).

Moreover, the record in *Stark* established that the school district did "not inquire into the motivations for a parent's objections; and that the district provides alternative instruction." (*Id.*, at 1072).

III.

Summary Reversal Is Not Appropriate

Petitioners urge this Court to summarily reverse the decision below on the basis that the New York Court of Appeals departed so far from the decision of the *Kiryas Joel* majority and *Agostini* as to warrant correction of the error. However, the decision of the New York Court of

Appeals is correct. Moreover, for all the reasons set forth above, it is in conformity with both the *Kiryas Joel* majority decision and *Agostini*. In addition, it is based on a carefully reasoned analysis of the highly factual issue as to whether Chapter 390 is a generally applicable religion-neutral law. Therefore, Respondents respectfully submit that the decision of the New York Court of Appeals is entitled to proper respect and plenary review, should this Court grant the Petition for Writ of Certiorari. (*See, Oregon State Penitentiary v. Hammer*, 434 U.S. 945, 947 (1997) (Stevens, J., dissenting); *Eaton v. Tulsa*, 415 U.S. 697, 707 (1974) (Rehnquist, J., dissenting); *Stone v. Graham*, 449 U.S. 39, 47 (1980) (Rehnquist, J., dissenting); *California v. Beheler*, 463 U.S. 1121, 1127 (1983) (Stevens, J., dissenting)).

CONCLUSION

FOR ALL THE FOREGOING REASONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: Albany, New York
July 2, 1999

Respectfully submitted,

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